

New York Law Journal

Lawyer's Bookshelf: Fighting for the City A History of the Corporation Counsel's Office

[Reviewed by Richard Briffault](#)

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"Fighting for the City: A History of the New York City Corporation Counsel," Professor William E. Nelson's magisterial history of New York's Law Department, is three books in one. First, it is a detailed study of the individuals who, over more than three centuries, held the office of corporation counsel and of the evolution of that office from a one-man operation in the 17th century to the multi-hundred member, multi-bureau complex institution it is today.

Second, it provides a lawyer's-eye view of the history of New York City from the days when it was a tiny port settlement clustered at the tip of Manhattan to the 21st century five-borough metropolis. The great events of New York's political, economic, and social development - the "slave conspiracy of 1741, the economic boom that followed the completion of the Erie Canal, the platting of Manhattan, the municipal water supply system, Central Park, Tammany Hall, the waves of immigration, the consolidation of Greater New York, the subway system, Prohibition, the Depression, the LaGuardia Era, the Fiscal Crisis, the charter revisions - are seen from the perspective of the lawyers who led the inquiries, drafted the ordinances, conducted the condemnation proceedings, litigated the cases and provided the advice on the legal issues central to these developments.

Third, it is a revealing examination of the delicate position of the public sector lawyer, torn three ways by his or her loyalty by three competing loyalties : to an elected superior, in the corporation counsel's case, the mayor; by duty to the institutional client - the corporation of the City of New York, its other elected officials, and its people; and a responsibility as a professional and member of the bar, to other, more transcendent values, including the rule of law, the needs of justice, and the requirements of the Constitution.

Although Nelson notes the orders of the mayor, the best interests of the city as a whole, and the rule of law have on happy occasions coincided, he also acknowledges that there have been many situations where these values have conflicted.

"Fighting for the City traces the Corporation Counsel's office back to 1686, when Governor Thomas Dongan promulgated the charter that established the Corporation of the City of New York, created the office of Recorder, and appointed James Graham to the job. As Nelson explains, the recorder's office can be traced back to medieval England and combined the functions of legal adviser to the corporation and judge. The recorder position continued through the American Revolution, but by the early 19th century, the need for a city lawyer undistracted by judicial obligations and accountable to the city, rather than appointed by the governor, became apparent.

In 1812, the Common Council, the city's legislative body, created the position of "Counsel and Attorney" to the corporation, to be appointed by the council. In 1849, the state Legislature wrote a new charter for the city that established a "law department" headed by an elected Counsel to the Corporation, much as the position of state attorney general is also an elected one. In the 1870s the charter was revised again to make the Corporation Counsel a mayoral appointee.

Over the years the office has been held by distinguished jurists - James Kent, better known as Chancellor Kent, one of the early systematizers of American law; political figures, including future mayors and federal cabinet officials; and lawyers, including founders and members of some of the city's leading law firms. Nelson devotes particular attention to William C. Whitney, who in the 1870s and 1880s built a professional staff; organized the office like a modern law firm and aggressively asserted control over the city's legal work; and to Allen Schwartz, Mayor Edward I. Koch's first Corporation Counsel, who, in the aftermath of the fiscal crisis of the 1970s, rebuilt the office along the lines of an elite law firm. Nelson also provides brief cameo sketches of dozens of senior staffers, tracing the interplay of aristocratic and clubhouse hirings and charting the emergence of different ethnic groups, and of women, over the years.

The "second book" is a fascinating view of the history of New York as seen through the prism of legal practice. For readers who are both New York City history buffs and lawyers, this book is a gold mine. The city's growth and development becomes a tale of leases of water lots, eminent domain litigation, bond indentures and defenses to state and federal court challenges to municipal taxes and regulations. The modern city requires an extensive physical and organizational infrastructure, and that in turn requires lawyers. Political, social and demographic changes are also refracted through legal analysis and litigation. An interesting theme is the growing cultural divide between the increasingly cosmopolitan and culturally liberal city and a more traditionally moralistic state and nation, with corporation counsel opinions providing the city with a legal basis for cutting back on enforcement of upstate-inspired blue laws restricting Sunday entertainment and on the national effort to impose Prohibition. On the other hand, cultural and political conflicts also often divided the city internally, with the city government and the corporation counsel not always on the liberal side - as 20th century crackdowns on homosexuals, "indecent" in books and on stage, and leftist teachers in the school system make clear.

But it is perhaps the "third book" which gives *Fighting for the City* its broadest appeal, for the questions of "who is the client?" and "what happens when the client's interest and the law collide?" are central questions for all public sector lawyers, if not all lawyers for complex organizations. As Nelson points out, the corporation counsel's office has always existed in an intensely political environment. Although at times he suggests that the political hiring practices that ran from the Tammany era deep into the 20th century as well as some of the clearly politically inspired actions of the Law Department at that time were an appropriate reflection of small "d" democratic politics, in general Nelson praises the long-term move toward nonpolitical hiring, the emergence of a permanent professional staff, and attention to rule of law values like respect for precedent and constitutional requirements in the Law Department's decision-making. Yet, he also recognizes that over time the head of the office, the Corporation Counsel, has grown ever closer to that supremely political figure, the mayor. This has been the source of frequent conflicts.

On occasion, as in Mayor Rudolph Giuliani's attack on the Brooklyn Museum during the "Sensation" exhibit, this has led the office to advance the mayor's personal agenda over constitutional values. On other occasions, the mayor has come into conflict with other elected city officials - the Public Advocate, the Comptroller, the City Council. Although the Corporation Counsel is counsel to the corporation, and ultimately represents the interests of the city as a whole, in all these disputed cases the Law Department has represented the mayor. Indeed, in one recent case in which Mayor Michael Bloomberg announced he would not enforce a law duly enacted by the Council over his veto, and the Council went to court to compel him to do so, not only did the Corporation Counsel represent the mayor but he argued for a narrow interpretation of city legislative power and a broad interpretation of state and federal preemption that is arguably at odds with the city's long-term legal interest.

This is not to say that the counsel did anything inappropriate; indeed the mayor's success before the Court of Appeals¹ suggest that professional rule of law values may have been on the counsel's side. Rather, the conflict among city officials - the profound uncertainty of who spoke for the city, and who decides what is in the best interests of the city - simply underscores the built-in difficulty of the public sector lawyer's position.

Such situations will no doubt recur, and will pose an ongoing challenge to the professionalism of this and other public sector law offices. The strength of Nelson's treatment is that it sketches out the elements of this dilemma without proposing a resolution.

Indeed, it is not clear there is any one correct resolution. In the end, lawyers will have to look to precedents and use their judgment. Nelson has provided an excellent study of how one prominent and topnotch law office has handled this dilemma over time. Surely, this will be of great benefit to public sector lawyers in the future.

Richard Briffault is the Joseph P. Chamberlain professor of legislation at Columbia Law School.

Endnote:

1. *Matter of Council of City of New York v. Bloomberg*, 6 N.Y.3d 380 (2006).

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